IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER,

Petitioner,

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Lawyers' Committee for Civil Rights Under Law in this case arises from the potential significance that a decision will have on the serious and growing problem of the systematic denial of the constitutional right to a speedy trial in the courts of this country because of docket congestion and other administrative difficulties.

In his petition for writ of certiorari, petitioner dealt primarily with the specific requirements of demand and

prejudice in asserting the constitutional right to a speedy trial. We believe that the decision in this case will affect the broader issues of the consequences of the denial of a right to a speedy trial for the administration of justice, the individual and society. The brief which amicus curiae is requesting permission to file will contain a more complete argument with regard to the constitutional and practical dimensions of this issue.

The Lawyers' Committee further respectfully moves for leave to present oral argument before this Court as amicus curiae.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

This brief is submitted amicus curiae on behalf of The Lawyers' Committee for Civil Rights under Law whose appearance as amicus curiae is moved in an accompanying petition. That appearance has been consented to by petitioner.

Opinions Below

The opinion of the United States District Court for the Western District of Kentucky has not been reported but is attached to defendant's Petition for Writ of Certiori as Appendix 1. The opinion of the United States Court of

Appeals for the Sixth Circuit affirming the decision of the District Court is reported at 442 F. 2d 1141 (1971).

Jurisdiction

The judgment of the Court of Appeals was entered on May 20, 1971. The petition for a writ of certiorari was filed on August 16, 1971, and certiorari was granted on January 17, 1971. The jurisdiction of this Court is based on 28 U. S. C. § 1254(1) (1970).

Question Presented

Is delay of more than five years between arrest and trial, caused solely by the Commonwealth of Kentucky, a deprivation of the Sixth Amendment right to a speedy trial?

Statutes Involved

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const. amend. VI.

Facts

A. Facts Relating to the Delay in the Trial of Willie Mae Barker

Willie Mae Barker was tried on October 9, 1963, and convicted for a murder which allegedly had been commit-

ted on July 20, 1958, almost 5 years and 3 months earlier. Petitioner and his alleged accomplice, Silas Manning, were arrested shortly thereafter and petitioner was indicted on September 15, 1958. Trial was originally set for October 16 of that year, but the Commonwealth obtained a series of 16 continuances which postponed the trial for over 5 years. During all but 9 months of that period, petitioner was free on $5,000 bail.

Petitioner was not responsible for any of this delay. Each continuance was requested by the Commonwealth. Originally the continuances were sought to allow the accomplice Manning to be tried.* An additional continuance was sought because of the sickness of the sheriff who had investigated the murders. In February 1962 or 1963** petitioner moved to dismiss the indictment against him because of the delay. This motion was denied.

Thus Barker did not cause the delay in his trial nor did he expressly waive his right to a speedy trial. The delay was for the benefit of the prosecution and the result was conviction for murder.

Unfortunately, that sorry tale of justice delayed and denied is typical and in many courts it may accurately be said to be the rule.

B. Facts Relating to the Magnitude of Delay Generally

> "Congestion in the trial courts of this country, particularly in urban centers, is currently one of the major problems of judicial administration. Notwithstanding the usual rule that criminal cases have

*Manning was tried six times. Two convictions were reversed by the Kentucky Court of Appeals before Manning was convicted of each murder, in March and December 1962.

**According to petitioner's brief, the record indicates the motion was made in 1962. Both the opinion of the District Court and the opinion of the Sixth Circuit give the date as 1963.

> priority over civil cases, this congestion has created serious difficulties for the administration of criminal justice. The continued pressures upon existing resources have been such that it is extremely difficult to dispose of all criminal cases with promptness and with due regard for fair procedures." AMERICAN BAR ASSOCIATION. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 1 (Approved Draft 1968) (hereinafter "ABA SPEEDY TRIAL STANDARDS").

That restrained statement of the American Bar Association indicates the growing concern with what has become a critical problem in the administration of criminal justice. At a time when it seems unusually important that public confidence in the criminal justice system be sustained, the problem of trial delay, and the resulting congested calendars, crowded jails and confused, assembly-line "justice", may dispassionately be labeled a crisis.

Various statistical studies give some indication of the numerical magnitude of the problem. They, of course, do not adequately reflect the human suffering and confusion which lie behind those numbers. They also do not reflect the perceived threat to public safety which the release and lengthy continued freedom of persons indicted and awaiting trial for serious crimes represents or the spreading concern with the ability of the criminal justice system to perform its tasks.

(i) The Federal Courts

On June 30, 1970, 20,910 criminal cases were pending in the United States district courts of which 6,179 or 30% had been pending more than one year. The Judicial Conference of the United States resolved that these cases should be regarded as a "judicial emergency by all judges". AN-

NUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1970, at 155-156 (hereinafter "1970 ANNUAL REPORT OF THE DIRECTOR"). Further, 52% of these pending cases involved fugitive defendants. *Id.* at 157. Despite the declaration of a judicial emergency, the situation is not improving. As of June 30, 1971, there were 8,690 criminal cases which had been pending more than one year (26% of the total pending) of which 4,535 or 52% involved fugitive defendants. This is an increase of over 2,500 or 41% in total cases pending more than one year from 1970 to 1971. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1971, at II-89 (hereinafter "1971 ANNUAL REPORT OF THE DIRECTOR"). In certain urban districts, the statistics are worse. Forty percent of all criminal cases in the Southern District of New York have been pending more than one year, although only 15.5% of these involve fugitive defendants. *Id.* at II-87. In the District of Columbia 23% of the 2,286 cases pending have been pending more than one year, but 52% have been pending more than six months.* *Id.* at II-87. In the Eastern District of Michigan 33% of all pending criminal cases have been pending more than one year and in New Jersey 29.1% have been pending more than a year. *Id.* Indeed in the federal system there are 83 cases awaiting trial which do not involve fugitive defendants which have been pending for more than 5 years! *Id.* at II-85.

The total number of criminal cases pending has been increasing by an average of 18% a year since 1968. The

*Only 7.1% of those cases pending more than six months but less than a year involve fugitive defendants whereas 24.4% of those pending more than a year involve fugitive defendants. This increase of 344% is itself alarming because it suggests that length of delay increases the number of fugitives.

average increase in those cases pending more than a year has been 21.8% during that time period. *Id.* at II-84. On the federal level, therefore, the problem is of continuing and growing significance.

(ii) The State Courts

The problem of delay in New York state courts became so acute by 1970 that drastic action was needed. At the end of 1968 the total non-traffic criminal backlog in New York City alone was 520,000 cases. (Twenty-five percent of the 480,930 new cases entering the system in 1968 were serious crimes, felonies and arrested misdemeanors). N. Y. C. CRIMINAL JUSTICE INFORMATION BUREAU, REPORT TO THE MAYOR'S CRIMINAL JUSTICE COORDINATING COUNSEL, THE NEW YORK CITY CRIMINAL COURT: CASE FLOW AND CONGESTION FROM 1959 TO 1968, at A-12 (1970) (hereinafter "CJIB CONGESTION REPORT"). At April 1, 1970, in New York City, there were 8,146 defendants detained prior to trial, 2,270 of which had been in jail for more than three months. Brief for the Mayor of the City of New York as Amicus Curiae at 5, United States ex rel. Frizer v. McMann, 437 F. 2d 1312, *aff'g en banc* 437 F. 2d 1309 (2d Cir.), *cert. denied*, 402 U. S. 1010 (1971). In all of New York State there were 2,899 defendants who had been in jail more than 3 months, 437 F. 2d at 1314. In part these massive delays and the resulting overcrowding of detention facilities such as the "Tombs" in New York City led to the widely publicized riots which began in August 1970. *See, e.g.*, N. Y. Times, August 11, 1970, at 1, col. 1.

Action taken in New York in response to these problems included the appointment of a new judicial administrator for the New York Criminal Court System who established a system of penalties for excessive pre-trial delay. N. Y. Times, February 21, 1971, at 44, col. 4, and the adoption of speedy trial rules by the New York Court of Appeals to be-

come applicable in the spring of 1972. New York Law Journal, April 30, 1971, at 1, col. 8. *See* p. 23 *infra*. Those reforms led to a dramatic decrease in the number of cases pending in the Criminal Court, where lesser crimes are prosecuted and where the rules are actually in effect, from 59,000 at January 1, 1971, to 27,816 at July 1, 1971, but the number of cases pending in the New York Supreme Court where felonies are prosecuted and where the rules were not yet in effect increased 23% from 6,494 in 1970 to 8,010 at June 30, 1971. N. Y. Times, August 4, 1971, at 1, col. 3. Thus in New York as well, the problem continues to be of growing significance.

New York can be seen as an example, albeit perhaps the most extreme one, of a problem that is general throughout the urban centers of this country. In California, for example, which has a strong statutory requirement of trial within a maximum of 60 days for serious offenses except upon a showing of good cause (Cal. Penal Code § 1382), the median time from indictment to judgment was 2.6 months in 1969. Even so, 10% of all cases or 4,874 took more than six months. In Los Angeles the median time from indictment to disposition by jury trial for the first half of 1970 was 124 days. For San Francisco it was 186 days. *Speedy Trial in Criminal Cases,* 46 CAL. ST. B. J. 649, 650 (1971). In New Jersey, there were 14,701 cases pending as of August 31, 1970, an increase of 19% from a year earlier. REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, FOR THE COURT YEAR 1969-1970, Table D-8. In Michigan 5.9% of the 11,726 criminal cases pending at the end of 1969 had been pending for more than two years. ANNUAL REPORT, SUPREME COURT OF MICHIGAN, JUDICIAL STATISTICS FOR 1969, at 72-74.

Similarly, a comparison of the statistics on delay for the Southern District of New York with other districts suggests

that it is not the worst. 1971 ANNUAL REPORT OF THE DIRECTOR, at II-87. At least two other courts have had more cases pending for over a year and 9 others have a substantial number of such cases. Undoubtedly the situation in the state courts in these jurisdictions must be similar to the problem in New York. The rash of speedy trial cases reaching the federal appellate courts after the decision in *Dickey* v. *Florida*, 398 U. S. 30 (1970), gives another clue as to the dimensions of the problem. *See* pp. 32-33 *infra*.

Summary of Argument

The backlog of criminal cases in many state and federal courts of this country is so large that an immediate solution is required. To make a solution possible and to discharge its constitutional obligation, this Court should declare that the Sixth Amendment requirement of a speedy trial must be read as providing generally in both federal and state courts that each criminal case must be tried within a fixed period of time after arrest.

We contend that the consequences of the existing delay seriously undermine confidence in the judicial process at a time when such confidence is vitally important to our society. Obviously, denial of the right to a speedy trial deprives individuals of a constitutionally guaranteed fundamental right. In addition, the costs to society of persons awaiting trial in diversion of resources and in the brutalization resulting from incarceration in the ghastly dens which our jails have become are costs we cannot afford. Equally intolerable is to have persons accused of serious crimes roaming at large for substantial periods of time while they await trial or, as is the fact in many thousands of cases, simply disappearing before those cases can be tried.

Many solutions are offered to the problems of denial of a speedy trial. Proponents of one category of solution

advocate the necessity for more judges, more prosecutors, more courtrooms; indeed more of everything. A number of national study commissions made up in major part of prominent participants in the criminal justice system—urge more efficient use of existing resources. In addition, broader plans have been put forth for the total reform of the entire criminal justice system. Those solutions are viable. It is the will that is lacking. We believe this Court can and should provide the impetus to make the necessary changes.

Our research of both ancient and modern precedent indicates that the pressure of court congestion has led some courts to back away from the guarantee of the Constitution or to hedge in the right to a speedy trial with seemingly unjustified conditions. In a separate historical appendix we demonstrate that, through Lord Coke's analysis of Magna Carta and the engrafted right of habeas corpus, the fundamental guarantee of a speedy trial was transmitted from medieval England to the American colonies, the Federal Constitution and the early state practice. Although this Court has repeatedly made clear that the Sixth Amendment's requirement of a speedy trial is not to be limited by expense or inconvenience, some courts have accepted what they deem to be practicalities as justification for denying defendants the right to a speedy trial. It seems plain that denying the right to a speedy trial by finding implied waivers of the right or by requiring that defendants demonstrate prejudice at trial are both not workable and not permissible within the plain meaning of the Sixth Amendment.

Several appellate courts have recently expressed serious concern about the growing backlog in our urban centers. On January 5, 1971, the Court of Appeals for the Second Circuit adopted a new set of rules governing the right to a speedy trial. Those rules generally require a trial in every case within six months after indictment. We believe

that the Sixth Amendment requirement of a speedy trial may be satisfied by rules similar to those adopted by the Second Circuit.

It is, of course, this Court's obligation to declare what the Constitution means. The speedy trial requirement in the Sixth Amendment clearly means that a defendant must be offered trial within a fixed period of time and that the wherewithal to make that offer a reality must be supplied by the state or federal government. The Court cannot choose the method by which the existing system may be reformed nor can it administer the implementation of that reform. It can and must, both constitutionally and practically, announce in unambiguous terms that a system which does not provide a criminal trial within a fixed period of time is not constitutionally permissible.

If the Court concludes that an immediate implementation of such rules would be unworkable, a transition period may be necessary and desirable.

Argument

I

THE CURRENT BACKLOG AND DELAY IN THE CRIMINAL COURTS BREEDS DISRESPECT FOR THE CRIMINAL JUSTICE SYSTEM, CAUSES LOSS OF INDIVIDUAL RIGHTS AND DANGER FOR SOCIETY.

A. Consequences of Delay for the Administration of Justice

Delay and the case backlog impair the proper administration of justice.

> "Swift and certain justice is a virtually unchallenged goal. Witnesses should be heard promptly while their recollections are clear. Innocent persons

> should not remain in jail for substantial periods of time pending trial. Guilty persons should not profit from tardy court processes, which postpone final adjudication and provide an opportunity for committing additional offenses while awaiting tral." REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 255-56 (1966) (hereinafter "D. C. CRIME COMMISSION REPORT").*

For those who can afford it and know how the system works, it takes little skill and less effort to remain free.

> "When the backlog is large, the defendant on bail is assured of considerable time before there is a realistic trial date, at which time he may plead guilty exactly as he might have done months earlier, or he may seek a continuance which is often granted by a court cognizant of other defendants who are ready to proceed to trial. This serves to further congest the calendar with pending cases which might have been terminated but for the opportunity of delay due to the existing backlog." *Id.* at 256.

Not only may he "plead guilty exactly as he might have done months earlier", but because he knows the rules his position at the plea-bargaining session is excellent. According to N. Y. Times, March 28, 1970, at 29, col. 1, "The courts are so crowded, they [New York City District Attorneys] say, that they fear they will not be able to win a conviction after trial, that delays are so long that by the time the trial begins, the witness may be gone. Thus they 'bargain' with defend-

*Members of the D. C. Crime Commission were Herbert J. Miller, Chairman, Marjorie M. Lawson, Vice Chairman, Frederiek A. Ballard, Donald S. Bittinger, C. Clyde Ferguson, Jr., Abe Krash, David A. Pine, William P. Rodgers and Patricia M. Wald. The Executive Director was Howard P. Willens, former First Assistant, Criminal Division, United States Department of Justice.

ant to agree to a lesser charge to which the defendant can plead guilty." In New York City in 1970, 80% of all felony charges were reduced or dismissed and only 7% went to trial *Id.* In many jurisdictions the percentage of guilty pleas is 90%. J. E. Lumbard, *Trial by Jury and Speedy Justice,* 28 WASH. & LEE L. REV. 307 (1971). In Washington, D. C. in 1966, 38% of those arrested were pleading guilty to lesser offenses, a rise of 55% from 1950. D. C. CRIME COMMISSION REPORT, *supra* at 253. Plea bargaining thus becomes a necessity because prosecutors, judges, courtrooms and defense counsel are too few to staff the number of possible trials. *See also Speedy Trial in Criminal Cases,* 46 CAL. ST. B. J. 649, 653 (suggesting mandatory plea bargaining as a partial solution to the problem of pre-trial delay).

Those cases which do run the blockade of delay are stale by the time they are eventually tried. Each party's case becomes more vulnerable to cross-examination and less persuasive to the jury. Defenses like insanity become very difficult to prove. Witnesses may be unable to remember precise details of events. *See, e.g., United States* v. *Chase,* 135 F. Supp. 230, 233 (N. D. Ill. 1955). Other witnesses simply become unavailable. *United States* v. *Parrott,* 248 F. Supp. 196, 204-05 (D. D. C. 1965); *United States* v. *Provoo,* 17 F. R. D. 183, 203 (D. N. D.), *aff'd mem.,* 350 U. S. 857 (1955). Indeed some potential witnesses, aware of the delay in the court system, refuse to become witnesses in the first place. D. C. CRIME COMMISSION REPORT, *supra* at 279. In addition, documents or physical evidence may deteriorate or be lost. *Dickey* v. *Florida,* 398 U. S. 30, 42 (1970) (Brennan, J. concurring). And for those who ultimately are tried and convicted, the delay between indictment and conviction lessens the deterrent, retributive and corrective value of any conviction. *See, e.g.,* J. BENTHAM, THE THEORY OF LEGISLATION 326 (Ogden ed. 1931); E. BANFIELD, THE UNHEAVENLY CITY 177-78 (1970).

B. Consequences of Delay for the Individual

To all of the foregoing, which impinges directly upon the administration of justice itself, must be added the consequences for the individual defendant and for society as a whole. As reported in THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 154 (February 1967) (hereinafter "CRIME COMMISSION REPORT")*:

> "It is clearly unfair to a defendant to jail him for months without trial; it is clearly unfair to the community for a defendant charged with a serious crime to be at large for months without trial. . . ."

The most obvious consequence for the individual defendant and that most destructive to his personal life is jail. Jail—labeled by the recent report of the National Commission on the Causes and Prevention of Violence as "often the most appalling shame in the criminal justice system"—means loss of a job,** disruption of family life with resulting domestic relations problems, individual psychological trauma and anxiety, loss of liberty, enforced idleness and

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*Members of the Crime Commission were Nicholas deB. Katzenbach, then Attorney General of the United States, Genevieve Blatt, Charles D. Breitel, Kingman Brewster, Garrett H. Byrne, Thomas J. Cahill, Otis Chandler, Leon Jaworski, Thomas C. Lynch, Ross L. Malone, James B. Parsons, Lewis F. Powell, Jr., William P. Rogers, Robert G. Storey, Julia D. Stuart, Robert F. Wagner, Herbert Wechsler, Whitney M. Young, Jr. and Luther W. Youngdahl. The Executive Director was James E. Vorenberg, Professor of Law at the Harvard Law School and first head of the Law Enforcement Assistance Administration and the Deputy Director was Henry E. Ruth, now Director of the Mayor's Criminal Justice Coordination Council in New York City.

**Recognition of this fact in Massachusetts led to a provision that those detained more than six months shall receive compensation for the period of detention beyond six months if acquitted or discharged without trial. Mass. Gen. Laws Ann. ch. 277, § 73.

public suspicion. FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 132 (1969) (hereinafter "VIOLENCE COMMISSION REPORT").*

In addition, jail severely hampers a defendant's ability to prepare his case. He cannot contact witnesses, freely communicate with his attorney or otherwise gather evidence. The inability on the part of a defendant to prepare his case adequately while in jail is reflected in the number of those detained before trial who are imprisoned after trial. Fifty-nine percent of those who were detained between indictment and trial went to prison, while only 22% of those not detained did. LAW AND ORDER RECONSIDERED, A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 435-36 (1969) (hereinafter "LAW AND ORDER RECONSIDERED"). That difference cannot be correlated with other differences in the backgrounds of the accused. Wald, *Pre-Trial Detention and Ultimate Freedom: A Statistical Study*, 39 N. Y. U. L. REV. 631 (1964).

Bail, another alternative, is also an unsatisfactory solution. In the first place it discriminates against the poor. In New York where the bondsman's fee is 5% (it is 10% in many other places), 25% of those placed on a bail of $500 could not post the bond. Forty-five per cent of those with bail of $1,500 and 63% with bail of $2,500 could not post it. CRIME COMMISSION REPORT, *supra* at 131. Nonetheless, 60% of those in New York City's 'Tombs" had their bail set in excess of $1,750. N. Y. Times, September 2, 1969, at 40, col. 1. In Washington, D. C., only 58%

*Members of the Violence Commission were: Dr. Milton S. Eisenhower, Chairman, Congressman Hale Boggs, Cardinal Terence J. Cooke, Ambassador Patricia Harris, Sen. Philip A. Hart, Judge A. Leon Higginbotham, Eric Hoffer, Senator Roman Hruska, Leon Jaworski, Albert E. Jenner, Jr., Congressman William C. McCulloch, Judge Ernest W. McFarland and Dr. W. Walter Menninger.

could pay the bail which was set. D. C. CRIME COMMISSION REPORT, *supra* at 505.

In addition, even those who are free on bail are subject to possible loss of job, public suspicion, personal anxiety and disruption of family similar if not quite in the same degree as one in jail. The longer the period between arrest and trial, the more severe the effect.

Personal recognizance is only a partial solution. First, personal recognizance is an even less available means of gaining freedom than bail. In New York, of those investigated by the Office of Probation, only 27% were permitted their liberty. VERA INSTITUTE OF JUSTICE, A REPORT TO THE MAYOR'S CRIMINAL JUSTICE COORDINATING COUNSEL, THE PROBLEM OF OVERCROWDING IN THE DETENTION INSTITUTIONS OF NEW YORK CITY: AN ANALYSIS OF CAUSES AND RECOMMENDATIONS FOR ALLEVIATION 28 (1969) (hereinafter "VERA DETENTION REPORT"). And secondly, as this Court explicitly recognized in *Klopfer* v. *North Carolina*, 386 U. S. 213, 221-22 (1967), personal recognizance solves only the one financial problem of ability to post bail. *See People* v. *Prosser*, 309 N. Y. 353, 356, 121 N. Y. S. 2d 574, 130 N. E. 2d 891 (1955).

Thus it is apparent that delay in the criminal courts of this country works a substantial deprivation of an individual's civil liberties and human rights without any adjudication of his guilt or innocence.

C. Consequences of Delay for Society

Were that not cause enough for serious concern, the consequences for society of jail or bail for extended pretrial periods are perhaps even more disquieting. From society's viewpoint, jailing the accused for prolonged periods is both expensive and likely to result in magnifying criminal tendencies. Release for substantial periods, on the

other hand, exposes society unnecessarily to the risk of repeated offenses.

As we know, our system of correctional institutions is in a deplorable state. *See, e.g.*, VIOLENCE COMMISSION REPORT, *supra* at 152; LAW AND ORDER RECONSIDERED, *supra* at 576-85; K. MENNINGER, THE CRIME OF PUNISHMENT (1968). How much worse then are our detention facilities, even in the best of times, which are designed merely as way stations, not as ultimate repositories for the convicted. It is rare to find any rehabilitative program being conducted in the jails; in fact, less than 3% of the total staff of the nation's 3,500 jails have any rehabilitative responsibilities. LAW AND ORDER RECONSIDERED, *supra* at 574.

In the words of the former Director of the United States Bureau of Prisons:

> ". . . [T]he typical jail has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult. . . . [T]he typical jail is dirty and overcrowded. The food is deplorable, supervision is scant, and there are no programs for self-improvement, or even for health and recreation. The typical jail has little to inspire the prisoner and much to demoralize him. The result is that he must spend his time there vegetating and degenerating and worse. . . . Unnecessary jail detention, in my opinion, is . . . a factor accounting for failure among those released on probation and even among those who are eventually freed of their current charges." *Hearings before Sen. Subcomm. on Constitutional Rights*, 88th Cong., 2d Sess., at 46 (testimony of James Bennett, former Director of the United States Bureau of Prisons) quoted in LAW AND ORDER RECONSIDERED, *supra* at 436-37.

Nor is this the best of times. Backlog and delay have caused severe overcrowding of already inadequate and antiquated facilities. VERA DETENTION REPORT, *supra* at 23. The New York City "Tombs" has a normal male detention capacity of 2,177. By September 1969, there were 6,613 defendants detained awaiting trial in the "Tombs". N. Y. Times, September 2, 1969, at 40, col. 1. Some attempt to remedy this problem was made by assigning 2,000 prisoners to be lodged on Rikers Island with convicted and sentenced offenders. This still left the Tombs at 211% of capacity. In August of 1970 a series of riots began in the "Tombs" because of this overcrowding and because of the delay between arrest and trial. *See, e.g.*, N. Y. Times, October 3, 1970, at 1, col. 8. A National Jail Census conducted in 1970 by the United States Department of Justice indicated that as of March 15, 1970, local jails throughout the United States held a total of 160,863 inmates of which 52% or 83,079 were pre-trial detainees. For those jails designed to hold 300 or more persons, more than 30% were overcrowded. NATIONAL JAIL CENSUS, UNITED STATES DEPARTMENT OF JUSTICE 1 (February 1971).

Sustained pre-trial detention in overcrowded facilities, which are at best cages designed for a few days confinement, with hardened criminals for companions, leads to a brutalization of the accused.* See N. Y. Times, April 8, 1970, at 45, col. 1.

> "An imprisoned defendant is subject to the squalor, idleness, and possibly criminalizing effects of jail. He may be confined for something he did not

*Incarceration in detention facilities rather than correctional facilities for any appreciable length of time without an adjudication of guilt is arguably cruel and unusual punishment in contravention of the Eighth Amendment of the Constitution of the United States. See, e.g., Trop v. Dulles, 356 U. S. 86, 100 (1958); Robinson v. California, 370 U. S. 660, 667 (1962).

> do; some jailed defendants are ultimately acquitted. He may be confined while presumed innocent only to be freed when found guilty; many jailed defendants, after they have been convicted, are placed on probation rather than imprisoned." CRIME COMMISSION REPORT, *supra* at 131.

Such an operation stands the criminal justice system on its head: an accused is confined prior to trial, tried and then released. Regardless of his original guilt or innocence, the accused has been punished and in the process forceably introduced to crime and criminals. The individual who emerges cannot help but be more cynical, more brutal and more likely to commit a crime than when he was arrested.

Finally, this inadequate and perverted system for the control of those accused of crimes is very expensive for society. Depending on the location of the detention facilities, the cost is from $3 to $9 a day per prisoner.* *Id.* For New York City this would mean close to $25,000,000 a year (assuming $10/day, times 365 days, times 6,613 prisoners, equals $24,137,750) or nearly half the amount spent on the Criminal Court and all five Supreme Courts in New York City including the Civil Term. CJIB CONGESTION REPORT, *supra* at A-11. Indeed this figure would be higher if the appropriate reforms were made to the detention facilities. LAW AND ORDER RECONSIDERED, *supra* at 458.

Release while awaiting trial is also not a satisfactory solution. Any release program which involves an extended period of freedom between arrest and trial poses a danger to society. Our system of crime control is based on the assumption that crime leads to arrest which is promptly followed by trial and punishment. Extensive delay creates

*This excludes lost wages which society is usually compelled to make up in welfare or other public assistance.

a system where crime is followed by arrest, release, more crime and only perhaps after rearrest trial and punishment. The number of those released on bail reported as committing crimes varies from 34.6% to 7.46%. District of Columbia Police Department Study, as reported in LAW AND ORDER RECONSIDERED, *supra* at 447; D. C. CRIME COMMISSION REPORT, *supra* at 515. The latter figure is probably a minimum. Moreover, the same study reveals that a significant number of those on bail committed felonies, and 80% of them committed felonies as serious or more serious than the ones for which they were originally arrested. *Id.* at 518. What is even more directly important for this case, delay seems clearly to exacerbate the problem. Sixty-eight per cent of all the crimes committed by those on bail were committed more than 30 days after arrest and 45.5% more than 60 days after arrest. D. C. CRIME COMMISSION REPORT, *supra* at 519. The D. C. Crime Commission therefore recommended trial within 30 days of those considered dangerous. *Id.* at 525-26.

Another study shows that of 557 persons indicted for robbery in 1968 in the District of Columbia, 70.1% of those released prior to trial were rearrested while on bail. A sample of those rearrested indicated 82.1% were convicted of the crime they were charged with committing while on bail. REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA 20-21 (May 1969) as reported in John N. Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention,* 55 VA. L. REV. 1223, 1236 (1969). As the then Attorney General pointed out in that article, even those statistics significantly understate the problem because arrests are made in less than 15% of all crimes committed and pre-trial release is ordinarily denied to those considered dangerous. *Id.* at 1237.

In addition as is pointed out in the 1971 ANNUAL REPORT TO THE DIRECTOR, fugitive defendants have become an ever more significant problem in federal criminal cases. "Violations relating to escape from custody, aiding and abetting escape, failure to appear in court, and bail jumping, have moved upward from 238 in 1961 to 1,245 in 1971—a jump of 423 percent." At II-60. Fifty-seven percent of all cases pending more than a year involved fugitive defendants who numbered 4,533. *Id.* at II-83, II-85.

In the instant case an individual indicted for a brutal murder for which he was ultimately convicted roamed free on $5,000 bail for almost 4½ years. Not only are the deterrent, retributive and corrective values of trial and punishment diminished drastically by such a delay, but those innocent members of the community where the crime was committed can have little faith in a system that permits an ultimately convicted felon his freedom for over 4 years.

Both the Bail Reform Act, Pub. L. 89-465, 80 Stat. 214 (1966), and the concept of preventive detention find genesis in the failure to provide speedy trials. Both attack, we believe, the wrong problem. They are put forth as solutions to the problem of what to do while waiting, especially over an extended period, for a trial. They treat a symptom, not the disease. The disease is the delay itself, and until it is cured the symptoms can be only temporarily relieved not eliminated.

II

VIABLE SOLUTIONS TO THE PROBLEM OF DELAY EXIST.

The problems of delay and backlog in the criminal courts of this country are not unsolvable, nor are they problems which have gone unstudied. Both studies and proposed solutions abound. The solutions fall roughly into three categories.

The first category of solution is that which involves more judges, more courtrooms, more prosecutors and more defense attorneys; in short, more money. To achieve that result something must be done to stimulate a willingness on the part of legislatures to allocate appropriate funds. We believe the necessary result of this case—a declaration by the Court of the constitutional requirement of a speedy trial—would go far in that direction.

The second category of solution, and one without which a substantial dose of the first category would probably not succeed, is a reform in the management of the court system. The CRIME COMMISSION REPORT contains a model timetable for various stages of a criminal proceeding which would result in a trial within four months of arrest and a complete disposition of the case within nine months, and it contains suggestions for its implementation. CRIME COMMISSION REPORT, *supra* at 154-56. *See also* TASK FORCE REPORT: THE COURTS 89-96 (1967). The feasibility of such a system has been demonstrated by experimental simulation on a computer. CRIME COMMISSION REPORT, *supra* at 258-59. The D. C. CRIME COMMISSION REPORT outlines a system to process cases within an eight-week period. D. C. CRIME COMMISSION REPORT, *supra* at 269-70. The ABA Project on Minimum Standards of Criminal Justice suggests a complete set of specifications for the orderly preservation of the right to a speedy trial. ABA SPEEDY TRIAL STANDARDS, *supra* at 5-9. Numerous studies have made other recommendations for substantial improvement in court management. *See, e.g.*, NORTH AMERICAN ROCKWELL INFORMATION SYSTEMS COMPANY, A MANAGEMENT AND SYSTEMS SURVEY OF THE UNITED STATES COURTS at I-3—I-5 (1969); LAW AND ORDER RECONSIDERED, *supra* at 509-24; and TASK FORCE REPORT: THE COURTS, *supra* at 80-96.

Significantly most of those studies and recommendations start from the premise that there is a specified period within which an accused must be brought to trial. The ABA Standards are most explicit in making this an absolute requirement.

> "A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specific event." ABA SPEEDY TRIAL STANDARDS, *supra* at 6.

This is the one essential component of any viable solution to the problem. It has been adopted in states which have dealt with the problem.* In California, as has already been indicated, failure to afford trial within 60 days of indictment entitles the defendant to an absolute discharge. Cal. Pen. Code § 1382.

On January 5, 1971, in connection with an en banc rehearing of *United States ex rel. Frizer* v. *McMann*, 437 F. 2d 1309, *aff'd en banc*, 437 F. 2d 1312 (2d Cir.), *cert. denied*, 402 U. S. 1010 (1970) the Second Circuit announced a series of rules "Regarding Prompt Disposition of Criminal Cases" in an attempt to deal with the enormous and growing problem recognized in *Frizer* of the systematic denial of speedy trials. Those rules provide in essence that in the case of detained defendants, the government must be ready for trial in 90 days or the defendant must be released upon bond or personal recognizance (¶ 3). In all cases, the government must be ready for trial within 6 months or the charges will be dismissed on motion of the defendant (¶ 4). Certain ameliorating provisions are included which exclude delay caused by the defendant and allow for prosecutorial continuances in extenuating cir-

*For a collection of those states see ABA Speedy Trial Standards, *supra* at 14, and Klopfer v. North Carolina, 386 U. S. 213, 220 n. 4 (1967).

cumstances (¶ 5). Nonetheless, the clear intent of the rules is to require readiness for trial within 6 months and the penalty is dismissal of the charges without a demonstration by the defendant of prejudice or prior demand. Appropriately the burden of speed is placed squarely on the government.

Those rules were adopted pursuant to 28 U. S. C. § 332 (1971) and therefore have no applicability to state courts within the jurisdiction of the Second Circuit. Nonetheless, the message to the state courts was clear, and on April 30, 1971, Chief Justice Stanley H. Fuld of the New York Court of Appeals, announced that the Administrative Board of the Judicial Conference of the State of New York had adopted speedy trial rules which would be applicable to all New York courts. New York Law Journal, April 30, 1971, at 1, col. 8. Those rules, which are to become effective on May 1, 1972, provide for similar periods between indictment and trial. The New York rules are even more stringent, however, in that they provide that not only must the government be ready for trial within the 90 days or six months, but also that the case must in fact go to trial within those periods. The New York rules also have similar ameliorating provisions. Although there has been some question as to whether sufficient funds will be made available to implement the New York rules, *see, e. g.*, N. Y. Times, November 21, 1971, at 84, col. 4, these rules, if properly implemented, promise a satisfactory solution to the problem.

The third category of solution involves an overall reform of the criminal justice system. The Violence Commission has suggested a program of coordinated study and experimentation which would lead to a modernized criminal justice system. VIOLENCE COMMISSION REPORT, *supra* at 156-67.

However, absent an authoritative statement of what the permissible time period between arrest and trial is, none of the foregoing solutions will be adopted. Neither the problem nor the studies are new. Trial delay has been recognized as substantial since at least the mid-1950's. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION, DEPARTMENT OF JUSTICE, MAY 21-22, 1956, at 162. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION, DEPARTMENT OF JUSTICE, JUNE 16-17, 1958, at 245. Some real efforts have been undertaken in the last few years to solve some of the problems of delay. In order to make those solutions possible it must be clear that this Court will require the speedy trial requirement of the Sixth Amendment to be honored by the courts. Viable solutions will then be adopted, funded and put into effect.

III

ALTHOUGH THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL IS UNAMBIGUOUS AND GROUNDED IN ANCIENT FUNDAMENTAL PRINCIPLE, IT HAS BEEN DENIED IN MANY CASES, OFTEN BY THE INEXORABLE RESULTS OF COURT CONGESTION.

Despite more than 700 years of Anglo-American jurisprudence guaranteeing the right to a speedy trial, some contemporary courts have excused unjustified delay on grounds of court congestion, implied waiver by the defendant and lack of prejudice at time of trial. Recent state and federal decisions have affirmed in general terms the right to a speedy trial, but in fact criminal defendants are regularly denied that right.

A. The Sixth Amendment recognized the traditional Anglo-American legal requirement that those charged with crimes be quickly tried.

That the right to a speedy trial "is one of the most basic rights preserved by our Constitution", *Klopfer* v. *North*

Carolina, 386 U. S. 213, 226 (1967), (quoted in *Dickey* v. *Florida*, 398 U. S. 30, 37 (1970)) can be seen clearly from a review of the background of the Sixth Amendment.*

From the Assize of Clarendon in 1166, the Magna Carta in 1215 and later medieval practice the right to a speedy trial has been part of traditional fundamental guarantees. The American colonists relied heavily on those direct English antecedents and particularly on Lord Coke whose SECOND INSTITUTE was the authoritative statement of the principles of Magna Carta in both England and in America. Lord Coke's famous statement "that Justice must have three qualities, it must be Free, because nothing is so criminal as Justice on sale; Full, because Justice ought not limp; Speedy, because delay is indeed denial; and then its both Justice and Right", 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND 55, was fully accepted in England and in the Colonies and early state governments. Habeas corpus became, by 1679, the principal way of enforcing the right to a speedy trial. By the time of the adoption of the Constitution in this country, habeas corpus had been adopted by a majority of the original colonies either by constitutional provision or by statute.

The requirement of a speedy trial was incorporated in the Bill of Rights without debate as a matter of course. When James Madison proposed a federal bill of rights in the First Congress it included the right to a speedy trial. The only discussion that followed seems to have concerned the question whether an accused (not the prosecutor) might, when necessity required, postpone his trial to the next session of court.

Early state constitutional and statutory guarantees normally included the speedy-trial right, not in general terms,

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*We have developed the historical background of the Sixth Amendment at some length in Appendix A. We briefly summarize that Appendix here.

but specifically, to make certain that each criminal defendant was tried within a short period of his arrest, usually within three to six months. Moreover, the right to speedy trial did not yield to administrative problems or expense but was considered absolute.

As the authority collected in Appendix A demonstrates, criminal cases were regularly dismissed where trial delay was far shorter than that often deemed "normal" today. Despite the fact that delay in the early nineteenth century was caused by administrative problems such as the unavailability of a prosecuting attorney, an insufficient number of judges or jurors, clerical failure or the lapse of time between scheduled terms of court, the right to a speedy trial was repeatedly vindicated. *See, e.g., State* v. *Stalnaker,* 2 Brevard (S. C.) 44 (Const. Ct. 1805); *State* v. *Sims,* 1 Tenn. 253 (Winchester Dist. Ct. 1807); *State* v. *Spergen,* 1 McCord (S. C.) 563 (Const. Ct. 1822); *Commonwealth Cawood,* 2 Va. Cas (4 Va.) 527 (1826). Lord Coke's interpretation of Magna Carta to require trial "speedily without delay" was thus implemented repeatedly in England, in courts in the American colonies and in the early state courts to overbear excuses of what perhaps then were "normal" administrative delays.

B. This Court has made clear that the Sixth Amendment applies to the States and that a State may not deny that right because of expense or inaction.

One of the fundamental cores of the liberties guaranteed by the Bill of Rights and the Fourteenth Amendment is the right to a speedy trial. *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967). As Justice White wrote in *United States* v. *Ewell,* 383 U. S. 116, 120 (1966):

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying

public accusation and to limit the possibilities that long delay and will impair the ability of the accused to defend himself."*

The Court soon after *Ewell* held that the right does not depend on confinement:

> "The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go 'withersoever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging that oppression, as well as 'the anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States." *Klopfer, supra* at 221-22.

The Supreme Court has required the state to make a diligent, good faith effort to bring a criminal defendant to trial, including every effort to bring him from prison in another jurisdiction. In *Smith* v. *Hooey,* 393 U. S. 374

*That right can also be implemented in a federal court by Fed. R. Crim. P. 48(b) which provides for dismissal in cases of delay. However, the wording of the Rule, that a court "may dismiss", is a statement of power and has led to some unfortunate views that courts have discretion with respect to a defendant's Sixth Amendment right to a speedy trial. The Constitution requires dismissal and therefore grants a right to a defendant. The Rule and the Constitution are not necessarily coterminous: Cohen v. United States, 366 F. 2d 363, 367 (9th Cir. 1966), cert. denied, 385 U. S. 1035 (1967). But where the Constitution is applicable, any part of the Rule which favors the prosecution must give way.

(1969), the Court stated directly that expense is not to be considered a mitigating factor:

> "Finally, the short and perhaps the best answer to any objection based upon expense was given by the Supreme Court of Wisconsin in a case much like the present one: 'We will not put a price tag upon constitutional rights.' State ex rel. Fredenberg v. Byrne, 20 Wis. 2d 504, 512, 123 N. W. 2d 305, 310." *Smith* v. *Hooey, supra* at 380 n. 11.

As the Court recently stated in *Dickey* v. *Florida*, 398 U. S. 30, 37:

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."

Thus, this Court has made clear that the Sixth Amendment means what it plainly says—an accused must be given a speedy trial or released. The Court has not yet had before it a claim that a delayed trial should be excused because of administrative scheduling problems. Since, however, the Court has refused to "put a price tag" upon a defendant's right to a speedy trial and has refused to approve the failure to take affirmative action by the prosecutor, it should follow that congestion—or "normal" court process—would not abrogate the Sixth Amendment.

C. Encumbering the right to a speedy trial with peripheral rules in effect denies the right.

Four factors have sometimes been used to determine whether a trial has been unconstitutionally delayed. Those four factors are: "(1) the length of the delay; (2) the reason for the delay; (3) the prejudice to the defendant; and (4) waiver by the defendant". *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88, 90 (2d Cir.), *cert. denied*, 396 U. S. 936 (1969). *See also Dickey* v. *Florida*, *supra* at 48, n. 12 (Brennan, J. concurring). We consider each of those factors in turn.

1. *Length of the Delay*—There has not been any definitive statement by this Court about how long a delay will be considered unconstitutional. That concern mirrors the views of other federal courts. *Hodges* v. *United States*, 408 F. 2d 543 (8th Cir. 1969) (17 months); *Falgout* v. *Trujillo*, 270 F. Supp. 685 (D. Colo. 1966), *aff'd per curiam*, 380 F. 2d 376 (10th Cir.), *cert. denied*, 389 U. S. 1010 (1967) (8 months). Our view is that each of those periods is too long.

The rules previously referred to adopted by the Second Circuit in connection with *United States ex rel. Frizer v. McMann*, *supra*, provide a maximum period of six months between arrest and trial.

2. *Reason for the Delay*—There are obviously reasons, such as illness or unavailability of the defendant which would justify delay of trial. In the instant cases the reason for delay—the state's desire to avail itself of a friendly witness—seems unacceptable. In many other cases the only reason offered is court congestion—the breakdown of the administrative processes of the criminal courts. Such an excuse would not have been sufficient to justify the delay to the Framers of the Constitution. Court congestion is

avoidable, indeed it may properly be said to be the result of a choice by governmental bodies between alternative priorities.

When court congestion has been urged as an excuse for delay several appellate courts, though tolerating the excuse, have expressed concern with that argument and its consequences. *See King* v. *United States,* 265 F. 2d 567, 569 (D.C. Cir.), *cert. denied,* 359 U. S. 998 (1959) (delay of 140 days); *Falgout* v. *Trujillo,* 270 F. Supp. 685, 688 (D. Colo. 1966), *aff'd per curiam,* 380 F. 2d 376 (10th Cir.), *cert. denied,* 389 U. S. 1010 (1967) (eight months); *Hodges* v. *United States,* 408 F. 2d 543 (8th Cir. 1969) (delay of 17 months). *See also Dickey* v. *Flordia, supra* at 38 ("Crowded dockets or lack of judges or lawyers, and other factors no doubt make some delays inevitable.") In our judgment, delay excused only by the inability of the process to function in a reasonably efficient manner is not an acceptable answer to the constitutional mandate that a trial be speedy.

3. *Prejudice to the Defendant*—In the present case below and in others such as *United States* v. *Lustman,* 258 F. 2d 475 (2d Cir.), *cert. denied,* 358 U. S. 880 (1958), it was held that in order to take advantage of Sixth Amendment rights a criminal defendant must show prejudice at the time of trial because of the delay. That rule, we believe, has no constitutional justification and no utility except to help excuse unjustifiable delay. As with other rights, prejudice should adequately be found from the fact of violation of the right.* Hence a tainted confession is inadmissible whether true or false and the conviction will

*No other specific procedural safeguard in the Bill of Rights which involves the reliability of the guilt determining process requires a demonstration of prejudice. See Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 493-94 (1968).

be reversed even if other evidence amply supports the verdict. *Jackson* v. *Denno,* 378 U. S. 368 (1964). Failure to admit the public to a trial is error regardless of prejudice. *United States* v. *Kobli,* 172 F. 2d 919, 922-23 (3d Cir. 1949); *Tanksley* v. *United States,* 145 F. 2d 58, 59 (9th Cir. 1944). Whether a defendant was in fact prejudiced by an insufficiently specific indictment is irrelevant although that right exists so that he will not be prejudiced by failing to be informed of the charge. *United States* v. *Seeger,* 303 F. 2d 478 (2d Cir. 1962). As Justice Brennan pointed out in his concurring opinion in *Dickey* v. *Florida, supra* at 41-43, 54-55, prejudice is inherent in substantial delay between arrest and trial both for the individual involved and for society generally. Justice Brennan suggested that once a prescribed period has elapsed, the government would have to sustain a showing of harmless error to avoid dismissal. Although that is a reasonable approach, it seems anomalous to require any showing of prejudice to be entitled to assert this particular constitutional right. Further it is likely to inject an issue capable of arbitrary interpretation into an otherwise stringent and understandable prophylactic rule Thus, the requirement that a defendant show prejudice should be overruled.

4. *Waiver by the defendant*—Of course, a defendant may waive his right to a speedy trial as he may waive any other constitutional right. But he must do so affirmatively, knowingly and with the effective advice of counsel. "Acquiescence in the loss of fundamental rights may not be presumed". *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). As then Judge Blackmun has written: "The right to 'a speedy trial' is constitutionally guaranteed and, as usual, is not to be honored only for the vigilant and the knowledgeable." *Hodges* v. *United States, supra* at 551. Again,

Justice Brennan points out in *Dickey, supra* at 49, that the accused ought not lose his right to speedy trial simply because of silence or inaction on his part. Such a rule misconceives the effect of delay and it misallocates the burden of providing speedy justice. Here it was in the interest of society to see that the petitioner was tried speedily, and it would be unwarranted to expect a defendant facing the possibility of a death sentence to demand trial. As Justice Brennan stated:

> ". . . It [the Sixth Amendment right to a speedy trial] is a safeguard of the interests of both the accused and the community as a whole. Thus, can it be that affirmative action by an accused is required to *preserve*—rather than to *waive*—the right?
>
> ". . . The accused has no duty to bring on his trial. He is presumed innocent until proved guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial." 398 U. S. at 50.

The requirement that a defendant whose trial has been delayed demonstrate prejudice or indicate that he has made the appropriate demand continues to be a substantial impediment to the exercise of the right to a speedy trial despite the statements by Justice Brennan in his concurring opinion in *Dickey* and despite the impending applicability of the speedy trial rules in the Second Circuit. *United States* v. *Quinn,* 445 F. 2d 940 (2d Cir. 1971) (failure to show demand or prejudice justified a two-year pre-indictment delay); *Short* v. *Cardwell,* 444 F. 2d 1368 (6th

Cir. 1971) (failure to demand a trial justified four-year delay); *Brady* v. *Superintendent, Anne Arundel County Detention Center,* 443 F. 2d 1307 (4th Cir. 1971) (failure to show prejudice justified eight-year delay between conviction and trial directed to punishment); *United States* v. *Rosson,* 441 F. 2d 242 (5th Cir. 1971) (lack of prejudice justified 11-month delay between arrest and trial); *Hoskins* v. *Wainwright,* 440 F. 2d 69 (5th Cir. 1971) (defendant must show prejudice from an 8½-year delay between indictment and trial); *United States* v. *Alo,* 439 F. 2d 751 (2d Cir. 1971) (no showing of prejudice justified three-year delay between secret indictment and reindictment and trial); *Maxwell* v. *United States,* 439 F. 2d 135 (2d Cir.), *cert. denied,* 402 U. S. 1010 (1971) (delay of five years justified because no demand made); *United States* v. *Smalls,* 438 F. 2d 711 (2d Cir.), *cert. denied,* 403 U. S. 933 (1971) (delay of two and a half years justified because no showing of prejudice and no demand).

The right to a speedy trial secured by the Sixth Amendment may not, we submit, be yielded to administrative delay, congestion or a series of exceptions which emasculate that right. The magnitude of delay already existing is such that if the right is overborne on those grounds, it will soon be eliminated entirely.

IV

THIS COURT SHOULD DECLARE THE MEANING OF THE CONSTITUTION'S REQUIREMENT THAT A CRIMINAL DEFENDANT BE GRANTED A SPEEDY TRIAL. A DECLARATION OF THAT MEANING SHOULD STIMULATE LEGISLATIVE ADOPTION OF AN APPROPRIATE SOLUTION TO THE PROBLEM OF DELAY.

Of course, this Court's responsibility is to declare the meaning of the Constitution of the United States. It has neither the power nor the resources to force the adoption

of a specific solution to the problem of delay. Nonetheless by declaring that the Constitution requires trial within a certain specified period, the legislature should perceive the necessity to make appropriate expenditures of time and money to seek and implement an appropriate solution to the problem. As the Court recognized in *Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954), despite the fact that a court may not have the tools to prescribe the precise means of reforming the system to meet the requirements of the Constitution, it can and indeed must declare what those requirements are and that those requirements shall be met. Unless this Court declares that the Constitution requires the state to offer a trial to a defendant within a period specified in days or months, the system itself will not respond. Studies will continue to proliferate, committees will beget more committees, and the great stagnant morass of untried criminal cases will spread its pollution through our entire judicial system tainting all we do with the stench of justice delayed and denied.

Nor, as has already been indicated, should this Court allow the use of the restrictive doctrines which excuse delay or look to an absence of prejudice or equate inaction with waiver to continue. The reason for delay is irrelevant to the requirement that trial be offered within a fixed period. Certainly exceptional delays resulting from defendant-initiated procedures can be excluded from the calculation of the period, but this should not affect the essential concept of a fixed period within which trial must be offered. Prejudice too is irrelevant. Furthermore, as has been indicated, regardless of any harm to the defendant, delay is prejudicial to the interests of the criminal justice system itself and society in general. Finally, waiver can continue to be an appropriate limiting doctrine only in so far as it is express and intelligently informed. This is consistent with the present thrust of criminal procedural law.

Realistically, some provision for a transitional period may be necessary. As has been demonstrated, the problem of backlog and delay is one which has been developing for some time. Its dimensions are now quite large, particularly in certain urban locations. An immediately effective, retroactively applicable declaration that all defendants must be offered trial within a sufficiently short period after arrest could result in a general jail delivery and an unbearable burden on the state's fiscal resources. Provision can be made for those practical problems however, and the necessity to provide such should not deter this Court from declaring the meaning of the Constitution. In the past declarations of constitutional principles which would have far reaching effect have led the court to apply them prospectively even though the defendant in question is permitted to benefit from their application. *Johnson* v. *New Jersey*, 384 U. S. 719, 726-35 (1966). Further, the legislature may be given a period of time before the absolute time limit is made fully applicable. *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955).

CONCLUSION

For all of the foregoing reasons, this Court should:

(1) declare that the Constitution requires that a criminal defendant be offered a trial within a specified period;

(2) discharge petitioner Barker because the system denied him that right; and

(3) affirm that, once a transitional period is past, any defendant who is not offered a trial within the specified period shall be discharged and the case against him dismissed with prejudice.

Anything more may be beyond the power of this Court. Anything less will authorize the continued, systematic violation of a fundamental constitutional right.

March 2, 1972.

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APPENDIX A

THE HISTORIC BACKGROUND AND CONTEMPORARY UNDERSTANDING OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

1. The Medieval Foundation

The recognition that justice delayed is justice denied is deeply rooted in Anglo-American legal history. Its place seems first to have achieved official acknowledgment from the crown only a century after the Norman Conquest, the period when the royal government first began asserting control over public order. In 1166, Henry II prescribed in Section Four of the Assize of Clarendon that

> ". . . if the justices are not about to come speedily enough into the county where [a robber or murderer, etc.] have been taken, let the sheriffs send word to the nearest justice . . . and let the sheriffs bring them before the justices. And . . . there before the justices let them stand trial." 2 ENGLISH HISTORICAL DOCUMENTS 407, 408 (D. Douglas and G. Greenway eds. 1953)."*

The terms of the Assize take on particular importance in the present context because of their explicit recognition that delay between apprehension and trial cannot be justified even when caused by the fortuity of administrative arrangements, rather than by the state's purposeful or negligent failure to proceed.

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*There is some dispute as to whether the document in which this provision appears is the Assize of Clarendon or an apocryphal composition of the same century. See H. Richardson and G. Sayles, The Governance of Medieval England 438-44 (1963). Even those who question the document's authenticity, however, concede that, "with some reserves [sic] . . ., the compilation may be accepted as a statement of the procedure in the latter part of Henry II's reign". *Id.* at 443.

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Henry II also systematized the practice of sending justices on frequent itineraries of "eyres" throughout the realm, in order to provide speedy justice at the local level. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 103 (5th ed. 1956). When this procedure was found to be too ponderous, it evolved into that of issuing commissions of gaol delivery and oyer and terminer as a means of dispensing local criminal justice at frequent intervals. *Id.* at 104; *see also* 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 105-11 (1883).

By the Statute of Westminster II, 13 Edw. I, stat. 1, ch. 30 (1285) in 1 PICKERING, STATUTES 203 (1762), it was provided that justices of assize, who customarily carried commmissions of gaol delivery, J. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 54 (7th ed. 1946), should go into every shire "thrice in the Year at the most". 13 Edw. I, stat. 1, ch. 30 (1285). The custom of assigning commissions of gaol delivery to justices of assize was formalized in 1299, when it was enacted that such justices "shall deliver the Gaols of the Shires". 27 Edw. I, stat. 1, ch. III (1299), in 1 PICKERING, STATUTES 281 (1762). In fact, delivery of the gaols apparently occurred more than three times per year during the 13th century, for Maitland found that "the Cambridge gaol seems to have been delivered about twenty-four times in seven years". 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 200 n. 3 (2d ed. 1959).

According to Sir Edward Coke, "Justices of Assise, Justices of *Oyer* and *Terminer*, and Justices of Gaol delivery came at the least into every county twice every year" by the reign of Edward III (1327-77). 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND *42. Perhaps the decline in the frequency with which the justices were appearing in

the shires prompted the statute, 4 Edw. III, ch. 2 (1330), in 1 PICKERING, STATUTES 430 (1762), which provided that "the . . . justices shall . . . deliver the Gaols; at the least three Times a Year, and more often, if need be". *Id.* In subsequent centuries, the duties of the traveling justices were gradually taken over by the local justices of the peace, who were empowered to hear and determine ("oyer and terminer") capital cases at their quarterly general sessions, as well as to deliver the gaols. PLUCKNETT, *supra* at 168-69, 429.

The creation of such a judicial structure was necessary in order to implement the most significant medieval recognition of the speedy-trial requirement as a fundamental legal precept, Chapter 40 of the Great Charter of 1215, in which King John pledged that "to no one will we deny or delay right or justice". Like Chapter 39, which provided for "lawful judgment of [one's] peers or by the law of the land", Chapter 40 was pregnant with potential growth at the hands of the common lawyers of the seventeenth century. Those two chapters, combined into Chapter 29 of the official reissue of 1225, remain on the English statute books to this day. J. HOLT, MAGNA CARTA 1 and nn. 1, 2 (1965). (The quotations from the Charter are Holt's translations. *Id.* at 327).

2. Lord Coke and the "Myth" of Magna Carta.

It is unnecessary to seek the original meaning of the Great Charter to appraise its impact upon the minds of seventeenth and eighteenth century Englishmen and their American counterparts. By that time, the Charter was shrouded in myth and, as Professor Plucknett observed, "the myth has been much more important than the reality" in Anglo-American constitutional development. PLUCKNETT, *supra* at 25.

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The principal architect of this myth was Sir Edward Coke, whose SECOND INSTITUTE achieved its importance, among the American colonists in particular, primarily because of its commentary upon Magna Carta, and "became the classical statement of constitutional principles in the seventeenth century". PLUCKNETT, *supra* at 25. Our history, as Professor Kurland has pointed out,

> ". . . has made clear that it was not the treaty between John and the barons at Runnymeade that provided 'the first great step on the constitutional road,' but Coke's version thereof, especially when combined with his equally inaccurate but highly palatable conception of the common law." Kurland, *Magna Carta and Constitutionalism in the United States: "The Noble Lie"*, in THE GREAT CHARTER 48, 51 (1965).

Thus, it is not surprising that in 1648, when the elders of the colony of Massachusetts considered revising their *Body of Liberties* of 1641, which had preceded by a year the publication of the SECOND INSTITUTE, they sent to England for a copy of the latter. 1 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 457 (1934).

The Great Charter as interpreted by Coke directly influenced the colonial charters, such as the Charter of Fundamental Law of West New Jersey of 1677, the New York Charter of Liberties and Privileges of 1683 and Pennsylvania's Charter of Liberties of 1682. William Penn, who drafted the Pennsylvania Charter, had demonstrated his familiarity with Coke and Magna Carta at his trial in 1670. KURLAND, *supra* at 52-53. Coke and Magna Carta were relied upon by Andrew Hamilton in his defense of Zenger, Kurland, *supra* at 54, and by James Otis, Thomas Hutchinson and other colonial pamphleteers. *E.g.*, Otis,

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The Rights of the British Colonies Asserted and Proved, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 408, 462 (B. Bailyn ed. 1965); *see also id.* at 26.

Coke's interpretation of Chapter 40 (Chapter 29 of the 1225 reissue)* thus provides a key to our understanding of the importance of the right to a speedy trial in the eyes of the colonists. In his exposition of King John's commitment neither to sell, deny nor delay justice, Coke wrote:

> "This is spoken in the person of the King who in judgment of law, in all his Courts of Justice is present. . . .
>
> "And therefore, every Subject of this Realm, for injury done to him *in bonis, terris, vel persona* [in goods, lands or person], by any other Subject, be he Ecclesiastical, or Temporal, Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND *55-*56.

"Hereby it appeareth," concluded Coke,

> "that Justice must have three qualities, it must be *Libera, quia nihil iniquius venali Justicia; Plena, quia Justitia non debet claudicare; & Celeris, quia dilatio est quaedam negatio* [Free, because nothing is so criminal as Justice on sale; Full, because Justice ought not limp; Speedy, because delay is indeed

*Coke's commentary follows the 1225 chapter numbering.

denial]; and then its both Justice and Right." *Id.* at *55.

Earlier, in his discussion of Chapter 36 (Chapter 26 of the 1225 reissue), which provided that the writ of life and limb would be freely given, Coke pointed out with obvious pride that

> ". . . the Justices of Assise, Justices of *Oyer* & *Terminer* and of Gaol delivery have not suffered the Prisoner to be long detained, but at their next coming have given the Prisoner full and speedy Justice, by due trial, without detaining him long in Prison." *Id.* at *43.

Indeed, the Justices had been "so far from allowing of his [the prisoner's] detaining in Prison without due trial," stated Coke, that the Abbott of St. Alban's had lost his franchise to operate a jail for refusing to deliver his prisoners to the justices because of the expense involved. *Id.* Thus, an early attempt to use expense as the excuse for delay was effectively quashed.

When we turn to the American colonies, we find that even before Coke's SECOND INSTITUTE had found its way into print, Magna Carta in its seventeenth century dress was having an impact upon the colonists' conception of fundamental law. The first two sections of the Massachusetts *Body of Liberties* of 1641 were modeled directly upon Chapters 39 and 40. THE COLONIAL LAWS OF MASSACHUSETTS 33 (W. Whitmore ed. 1889). But the Massachusetts colonists were unwilling to rely upon a general statement of the right to a speedy trial. Section 41 of the *Body of Liberties* gave force and direction to the general concept:

> "Everie man that is to Answere for any Criminal cause, whether he be in prison or under bayle, his

> cause shall be heard and determined at the next Court that hath proper Cognizance thereof, And may be done without prejudice of Justice." *Id.* at 43.

Apparently even this provision did not sufficiently guarantee the right to a speedy trial in the eyes of the Massachusetts colonists. In their *Laws and Liberties* of 1660, after providing that the Court of Assistants, which had jurisdiction over serious crimes, should sit twice a year at Boston, they stated,

> "And that justice be not deferred nor the Country needlessly charged, It shall be Lawfull for the Governor, or in his absence the Deputie Governour (as they shall judge necessary) to call a Court of Assistants for the tryal of any Melefactor in Capital Causes." *Id.* at 148.

Although it does not directly reflect the influence of the Charter, the *Duke of York's Laws,* compiled from statutes used in other colonies by Richard Nicholls, the first English governor of the colony, and issued at Hempstead, Long Island in 1665, 1 COLONIAL LAWS OF NEW YORK 6 (1896), accepted the validity of the speedy trial concept and recognized that delay because of administrative difficulties is as harmful in result as purposeful or malicious delay. After providing for the Court of Assizes to be held once a year at New York City, the laws mandated that when,

> "Upon information from any Court of Sessions to the Governour and Counsell of any Capitall Offender, unless the Court of Assizes shall happen to be within two Months time after such information; The Governour and Counsell shall Issue forth a

> Commission of Oyer and Terminer for the more Speedy Trial of such Offender." *Id.* at 16-17.

The theoretical underpinnings of this provision was provided seven years later when the colony of New York adopted its own *Charter of Liberties and Privileges,* in which it set forth the protections found in Chapter 29 of the 1225 reissue of the Charter, including the right to speedy trial, in words which are virtually those of the Great Charter itself:

> "That no free man shall be taken and imprisoned or be desseized of his freehold or liberty or free customs, or be outlawed or exiled, or any other ways destroyed, nor shall be passed upon, adjudged, or condemned but by lawful judgment of his peers and by the law of his province. Justice nor right shall be neither sold, denied, or deferred to any man within this province." 9 ENGLISH HISTORICAL DOCUMENTS 228-29 (M. Jensen ed. 1955).

The influence of Magna Carta's proscription of judicial delay is found in other colonial charters, such as article 19 of the Fundamental Constitutions for the Province of East New Jersey art. 19 (1683) in 4 THORPE, FEDERAL AND STATE CONSTITUTIONS 2574, 2580 (1909); the "Laws Agreed Upon in England" (between William Penn and the leaders of Pennsylvania) art. V (1682), in 6 *id.* at 3059, 60, and in a number of the state constitutions which were written prior to the Federal Constitution of 1787. *See, e.g.,* N. C. DECL. OF RIGHTS art. 13 (1776); DEL. CONST. art. I, § 12 (1777); MASS. CONST. Part I, art. XI (1780); N. H. CONST. Part I, art XIV (1784):

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The Massachusetts Constitution of 1780 guarantees the right in terms reminiscent of Coke's ringing phrases:

> "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." MASS. CONST., Part I, art. XI (1780); *see* MASSACHUSETTS COLONY TO COMMONWEALTH, 129-30 (R. Taylor ed. 1961).

3: The Habeas Corpus Act and Its Influence Upon the Colonies

The right to a speedy trial, as is true of most fundamental rights, is not self-executing. And it was not until after the Restoration of Charles II that an effective means of enforcement against royal evasion was found. The primary purpose of the Habeas Corpus Act of 1679, 31 Car. II, ch. 2, was to close loopholes which had rendered the writ of habeas corpus ineffective in securing its objects. *See, e.g.*, WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 79-85 (1960). One of the effective means of evading the writ's purposes was the simple expedient of delaying the defendant's trial. In Section 6 of the Act, an equally simple method of combatting that tactic was adopted:

> ". . . [I]f any person or persons shall be committed for High Treason or Fellony . . . upon his Prayer or Petition in open Court the first Weeke of the Terme . . . to be brought to his Tryall shall not be indicted

> sometime in the next Terme . . . after such Committment . . . the Judges of the Court of Kings Bench . . . are hereby required upon motion to them made in open Court the last day of the Terme . . . either by the Prisoner or any one in its behalfe to sett at Liberty the Prisoner upon Baile unlesse it appeare to the Judges and Justices upon Oath made that the Witnesses for the King could not be produced the same Terme. . . . And if any person or persons committed as aforesaid upon his Prayer or Petition in open Court the first weeke of the Terme . . . to be brought to his Tryall shall not be indicted and tryed the second Terme . . . after his Committment . . . he shall be discharged from his Imprisonment." 31 Car. II, ch. 2 § 6 (1679), in 1 N. COSTIN & J. WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914, at 46, 49-50 (2d ed. 1961).*

In requiring that the prisoner be bailed if he were not indicted by the first term after his arrest and that he be discharged if he were not both indicted and convicted within two terms, regardless of the reasons for his arrest, the Act transformed a medieval writ of humble origins into a modern and tangible guarantee of a speedy trial. Administrative delay—the absence of Crown witnesses—was tolerated, but for one term only; after the second term the accused was discharged.

The virtues of the Act were immediately perceived by the colonies prior to 1700, and three of them, Massachusetts, New York and Pennsylvania, sought to adopt it expressly.

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*Section 5 of the Act prohibited the prisoner's being recommitted for the same offense after being discharged upon habeas corpus, *id.* at 49, thereby seemingly giving the discharge res judicata effect.

But the Privy Council took the position that it did not apply to the colonies and annulled the colonial legislation, Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 251 (1965), a policy consistent with James II's attempts to repeal the Act. 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 118 (1927). In the eighteenth century, however, the Crown's policy changed and the Royal Governors of Virginia, North Carolina and South Carolina extended the Act's operation to their colonies by proclamation. Oaks, *supra* at 251. Perhaps out of an excess of caution, South Carolina also adopted it by statute in 1712. 2 S. C. STAT. 399 (Cooper ed. 1837). Examples of the use of habeas corpus have been found in other colonies, *see, e.g.*, J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 155 n. 71, (1944), and in some of the colonies courts were authorized by statute to issue writs. *See, e.g.*, Act of 1722, in CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA 387, 390 (J. Linn ed. 1879).

South Carolina was the only colony which had a statute patterned directly after the English Act at the time of the Declaration of Independence, a fact which Professor Oaks finds surprising, Oaks, *supra* at 251, but which Professor Chafee explains on the grounds that "it had been so long and solidly established in every colonly that assertion was probably considered unnecessary". Chafee, *The Most Important Human Right in the Constitution*, 32 B. U. L. REV. 143-44 (1952). Professor Chafee's conclusion is supported, as Professor Oaks recognizes,* by the fact that the newly independent Americans thought it unnecessary to secure

*Professor Oaks finds the suspension provision in article I, section 9, clause 2 of the Federal Constitution inconsistent with Professor Chafee's views, however, although his reasons for doing so are unclear. Oaks, *supra* at 248.

explicitly many other fundamental rights in more than half of the early state constitutions. Oaks, *supra* at 248. Professor Chafee's conclusion is further buttressed by the seeming assumption of the draftsmen of the Federal Constitution that it was unnecessary to assert the right explicitly, but only to limit the conditions under which it could be suspended. U. S. CONST. art. I, § 9, cl. 2. Moreover, the absence of explicit adoption of habeas corpus acts by some of the original states may also be explained by the "reception" clauses in many state constitutions and statutes, *e.g.*, N. J. CONST. art. 22 (1776); N. Y. CONST. § 35 (1777); DEL. CONST. art. § 25 (1777), whereby English common and statute law in force in the colony prior to independence remained in force.

In any event, by 1787 habeas corpus had been expressly adopted by a majority of the original colonies, either by a general provision in their constitutions, N. C. CONST. art. XIII (1776); MASS. CONST. ch. 6, art. VII (1780); N. H. CONST. (unnumbered clause) (1784); or by a constitutional or statutory provision modelled after the English Act, GA. CONST. art. LX (1777) (incorporates Habeas Corpus Act of 1679); 1 MASS. GEN. LAWS ch. 71 (1784); Act of Feb. 21, 1787, N. Y. LAWS 1785-88, at 424 (1886); Act of Feb. 18, 1785, PA. GEN. LAWS 142 (Dunlop, 2d ed. 1849); Act of 1784, 11 LAWS OF VA. 408 (Hening ed. 1823). Two more states, Delaware and New Jersey, passed statutes soon after, DEL. LAWS ch. IV (1793); Act of Mar. 11, 1795, N. J. REV. LAWS 193 (1820).

Virtually all the early state habeas corpus legislation closely conforms to the English Act. Oaks, *supra* at 253. Delaware's statute of 1793 is illustrative of the provision securing a speedy trial:

> ". . . [I]f any person shall be committed for treason or felony, and shall not be indicted and tried some

time in the next term, . . . after such commitment, . . . the judges . . . are hereby required, upon the last day of the term . . . , to set at liberty the said prisoner upon bail; unless it shall appear to them upon oath or affirmation, *That the witnesses for the state,* mentioning their names, *could not then be produced;* and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment . . . he or she shall be discharged from imprisonment." DEL. LAWS ch. IV, § 3 (1793).

4. The Adoption of the Sixth Amendment

It was against this background that George Mason, Virginia lawyer and constitutional draftsman, penned the Virginia Declaration of Rights. *See Virginia Convention of 1776,* in 6 AMERICAN ARCHIVES, 4th Ser., cols. 1509, 1524-29, 1537-57, 1561 (P. Force ed. 1846). *See also* R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 39 (1955). The place in the colonies of the ringing phraseology of Coke's commentary upon Magna Carta and the Habeas Corpus Act of 1679, which Virginia had adopted prior to 1700 (although it was annulled by the Privy Council), made it quite natural that the Declaration of Rights would include the provision that "[I]n all capital or criminal prosecutions, a man hath right . . . to a speedy trial." VA. DECL. OF RIGHTS § 8 (1776).* When the Virginia convention which ratified the Federal Constitution in 1788 proposed that a Bill of Rights be added to that document, the requirement of a speedy trial was included as a matter

*The right to speedy trial was also guaranteed by five other early state constitutions (in addition to Virginia). Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights art. XIX (1776); Pa. Decl. of Rights art. IX (1776); Mass. Const. Part I, art. XI (1780); N. H. Const. Part I, art. XIV (1784).

of course and without debate. 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 657, 658 (1881); *see also* 4 *id.* at 242-43 (amendments proposed by North Carolina).

The importance of the right to a speedy trial was also recognized by the Continental Congress. In 1786 a committee reported to the Congress on "a plan of a temporary government for such districts or new states as shall be laid out by the United States". 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 699 (J. Fitzpatrick ed. 1934). The report, which was passed by Congress, *id.* at 669 n. 1, contained only one provision specifying fundamental rights of the inhabitants of such territories:

> "*Resolved*, that the inhabitants of such districts shall always be entitled to the benefits of the Act of habeas corpus and of the trial by Jury." *Id.* at 670.

It seems highly significant that out of all the fundamental rights claimed by the colonists, the two which Congress expressly extended to the new territories at this time were trial by jury and the "Act of habeas corpus," an act which, *inter alia*, implemented the right to a speedy trial. This provision was modified only slightly when a full bill of rights was included in the Northwest Ordinance of 1787.*

The proposed Federal Bill of Rights, as introduced by James Madison in the first Congress, included the "right to a speedy and public trial". 1 ANNALS OF CONGRESS 1st Cong., 1st sess. col. 435. The proposed amendments were first considered by a select committee, *id.* at cols. 450, 660-

*The 1787 Act provided,

> "The inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury . . ." 1 Stat. 51, 52 n. (a).

65, 672, the debates of which are not recorded. They were then discussed in the committee of the whole. *Id.* at cols. 703-61. The discussion on the speedy trial requirement is illuminating:

> "Mr. Burke moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence."
>
> "Mr. Hartley said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court.
>
> "Mr. Smith, of South Carolina, thought the regulation would come properly in, as part of the Judicial System.
>
> "The question on Mr. Burke's motion was taken and lost; ayes 9, noes 41." *Id.* at col. 756.

Thus, at least in the mind of Congressman Burke, the speedy trial requirement seemed to require a trial at the first session of the court after charge, and, so far as appears from the records, no one argued the contrary. Furthermore, while Burke and others were concerned about allowing the accused to postpone his trial for one term, either as of right or in the court's discretion, no one suggested that the government should be allowed to do so.

The time period represented by a term or "session" of court was, moreover, clear in the minds of those voting in favor of the speedy trial requirement. The same Congress

which adopted the Sixth Amendment also adopted the Judiciary Act of 1789. 1 Stat. 73. Indeed, debates on that act were taking place at about the same time as discussion of the amendments. *See, e.g.*, 1 ANNALS OF CONGRESS, 1st Cong. 1st sess., cols. 659, 782. Section 4 of the act created circuit courts, 1 Stat. 74, which were given jurisdiction over serious crimes. Judiciary Act of 1789, § 11, 1 Stat. 78. The circuit courts were required to hold sessions in each district every six months, and "shall have power to hold special sessions for the trial of criminal causes at any other time." Judiciary Act of 1789, § 4, 1 Stat. 74, 75.

5. The Contemporary Understanding of the Right to a Speedy Trial

The interpretation of the right to a speedy trial in criminal cases by those who lived at the time the Sixth Amendment was adopted and ratified provides further evidence of its intended scope and content. As Zephaniah Swift, author of one of the first American legal treatises, pointed out, the place accorded to this right in the new nation was yet another indication of the contrasts between democracy and monarchy:

> "... If the offense be not bailable, or the criminal unable to procure bail, be committed to prison, there are courts of law constituted for the trial of all offenses, which sit so frequently, that a person can lie in prison but a short time, before he will have a fair opportunity of manifesting his innocence, or of being proved guilty, and obtaining his enlargement, by suffering the punishment that his crime deserves.
>
> "How different this is from the practice of all despotic governments. There the monarch has power

> to commit a man to prison, upon any pretense whatever, and there detain him so long as he pleases without bringing him to trial; . . ." Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 180 (1795).

As Thomas Jefferson pointed out in his description of the administration of justice in the State of Virginia, the Founding Fathers were concerned that the courts be organized in a manner which would assure every defendant an opportunity to receive the benefits of the right to a speedy trial. In addition to creating county courts which followed the example of the English quarter session, Virginia also provided that the General Court, which had jurisdiction over serious crimes, should sit twice a year "for business civil and criminal, and twice more for criminal only." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 125 (T. Abernethy ed. 1964).

The contemporary understanding of the scope and content of the right to a speedy trial is clearly indicated by a number of state court decisions in the early nineteenth century. *State* v. *Sims,* 1 Tenn. 253 (Winchester Dist. Ct. 1807), provides an excellent illustration of the absolute nature of the right, as well as the fact that administrative delay was no excuse. The court held that

> "The ninth section of the Bill of Rights secures to the citizen a speedy public trial, and to demand the cause of the accusation against him. The State has omitted to provide an attorney-general since the resignation of the former one. Upon this man's demanding the cause of accusation against him, and that he shall have a trial, and there being no reason shown why he should not, he ought to be discharged. The omission of the State to provide a public prose-

> cutor cannot render the provision of the Constitution inefficient; this circumstance of itself furnishes no ground to keep the prisoner six months longer in confinement."

Similar holdings may be found in the reports of other states, usually decided under the Habeas Corpus Acts. *See, e.g., State* v. *Stalnaker,* 2 Brevard (S. C.) 44 (Const. Ct. 1805) (Defendant was indicted twice for counterfeiting; tried, convicted, sentenced to hang on one indictment, and pardoned. Two terms having then passed since the second indictment, he was discharged under Habeas Corpus Act); *State* v. *Spergen,* 1 McCord (S. C.) 563 (Const. Ct. 1822); *Commonwealth* v. *Cawood,* 2 Va. Cas. (4 Va.) 527 (1826) (Clerical failure to record indictment; two terms having passed since his commitment for trial, defendant discharged under Habeas Corpus Act). *But cf. Ex parte Santee,* 2 Va. Cas. (4 Va.) 363 (1823) (term of court means actual sitting of court; where scheduled term of court not held because judge ill, not a "term" within meaning of Habeas Corpus Act); *Commonwealth* v. *Sheriff and Gaoler of Allegheny County,* 16 Serg. & R. (Pa.) 304 (1827) (delay of accessory's trial because of preconviction escape of principal does not entitle accessory to writ of Habeas Corpus where conviction of principal legally indispensible to conviction of accessory).

The dissent in *Santee* by Parker, J., with whom three other justices concurred, is of particular interest here because it indicates the concern manifested by the legislature, as well as by the courts, that defendant not be held awaiting trial because of administrative problems:

> "When the District Court system was adopted, this feature [the speedy trial requirement of the *habeas*

> *corpus* act] in the Criminal Law was carefully preserved with this important addition, that the prisoner could not be tried without his consent, by *one* Judge, and that if two did not attend the first Term, he was entitled to bail if not indicted; at the second Term, to be discharged without bail, and if not tried the third Term in consequence of the *absence of one of the Judges*, to be discharged forever from the crime. Now, here, the non-attendance of a Judge was expressly contemplated and provided for. It was to make no difference in the rights of the accused, althought with his consent he might be tried by one; . . ." 2 Va. Cas. at 369.

Perhaps the most conclusive indication of the fundamental nature of the right to a speedy trial in the minds of Americans in the early nineteenth century is *State* v. *Phil*, 1 Stewart (Ala.) 31 (1827). Defendant Phil was a slave, indicted for attempt to commit rape "on a free white woman". At the first term of court following his indictment, the sheriff was unable to produce sufficient *tales* from which to pick a jury. At the second term, to which the trial had thereupon been adjourned, the presiding judge was informed of illness in his family and adjourned the court prior to defendant's case being called. Defendant's counsel moved for dismissal under the Habeas Corpus Act, LAWS ALA. 662 (1807). The motion was denied and at the third term following his indictment, defendant was convicted and sentenced to death. On appeal following his conviction, the Supreme Court of Alabama reversed the denial of the motion for dismissal and ordered defendant discharged under the Habeas Corpus Act. Thus, in Alabama in 1827, even a slave's right to a speedy trial was considered of such

overbearing importance that his conviction of assault upon a white woman was overturned because of delay in his being brought to trial, delay caused by administrative problems and not by purposeful or negligent acts on the part of the state.

6. Conclusion.

The foregoing investigation of the history and contemporary understanding of the right to a speedy trial strongly confirms, we submit, this Court's holding in *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967) that "it is one of the most basic rights preserved by our Constitution," *id.* at 226, a right, moreover, which does not give way in the face of administrative problems on the part of the state, no matter how severe or unforeseen. Whether the problem is a vacancy in the office of attorney general (*State* v. *Sims, supra*), an inadequate number of judges (*Ex parte Santee,* dissenting opinion, *supra*), or jurors (*State* v. *Phil, supra*), clerical failures (*Commonwealth* v. *Cawood, supra*), or lapse of time between scheduled terms (Assize of Clarendon; *Duke of York's Laws, supra*), administrative difficulties could not outweigh the individual's right to have and the state's duty to provide a speedy trial. Justice "promptly, and without delay," in the words of the Massachusetts Constitution of 1780, echoing Coke, was considered an absolute in the minds of those living in the period when the Sixth Amendment was adopted.